

**THE HIGH COURT**

[2021] IEHC 671  
[2021 No. 139 EXT]

**BETWEEN**

**THE MINISTER FOR JUSTICE**

**APPLICANT**

**AND**

**JOSEF TORAC**

**RESPONDENT**

**JUDGMENT of Mr. Justice Paul Burns delivered on the 11th day of October, 2021**

1. By this application, the applicant seeks an order for the surrender of the respondent to the Slovak Republic pursuant to a European arrest warrant dated 27th December, 2018 ("the EAW"). The EAW was issued by Judge Suzana Bartalska, of the District Court of Bratislava, as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent in order to enforce a sentence of three years' imprisonment imposed upon the respondent on 18th December, 2017, all of which remains to be served.
3. The respondent was arrested on 25th May, 2021 on foot of a Schengen Information System II alert and brought before the High Court on 26th May, 2021.
4. The EAW was produced to the High Court on 4th June, 2021.
5. I am satisfied that the person before the Court, the respondent, is the person in respect of whom the EAW was issued. No issue was raised in that regard.
6. I am satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), arise for consideration in this application and surrender of the respondent is not precluded for any of the reasons set forth in any of those sections.
7. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. The sentence in respect of which surrender is sought is in excess of four months' imprisonment.
8. At part E of the EAW, it is indicated that it relates to one offence and the description of the circumstances in which the offence was committed and the degree of participation in same by the requested person is set out. The respondent was involved in the illegal crossing of several Indian nationals into the Slovak Republic and their subsequent transportation into Austria. Section 38(1)(b) of the Act of 2003 provides that it is not necessary for the applicant to establish correspondence between the offences to which the EAW relates and offences under the law of the State where the offences referred to in the EAW are offences to which Article 2.2 of the European Council Framework Decision dated 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, as amended ("the Framework Decision"), applies and carry a maximum penalty in the issuing state of at least three years' imprisonment. In this

instance, the issuing judicial authority has certified that the offences referred to in the EAW are offences to which Article 2.2 of the Framework Decision applies, that same are punishable by a maximum penalty of at least three years' imprisonment and has indicated the appropriate box for "*facilitation of unauthorized entry and residence*". There is no manifest error or ambiguity in respect of the aforesaid certification such as would justify this Court in looking beyond same. Correspondence was not put in issue.

9. At part D of the EAW, it is indicated that the respondent did not personally participate in the proceedings leading to the decision. The issuing judicial authority has indicated at part D of the EAW that it is relying upon the equivalent of point 3.2. of the table set out at s. 45 of the Act of 2003. It is indicated at part D of the EAW:-

*"3.2. the person concerned, being aware of the intended proceedings, has authorised a legal representative, either appointed by the person concerned or appointed by the State, to defend him or her in the proceedings, and that legal representative has defended him or her in the proceedings."*

The issuing judicial authority goes on to state:-

*"Proceedings were conducted in the case against a absconder, i.e. the convict Jozef Toráč, born 04.06.1974, who was appointed a defence counsel by order of the District Court of Bratislava V, case ref. no. 4Tp/27/2017 of 29.03.2017, who represented him in the proceedings."*

10. The respondent objects to surrender on the grounds that the sentence was passed *in absentia* and that the requirements of s. 45 of the Act of 2003 have not been met.
11. The respondent swore an affidavit dated 11th June, 2021 in which he avers that in or around 2006 he met with Slovakian police on a number of occasions by arrangement. He avers that he was being treated as a potential witness, not as a suspect, and that he was not aware of any intended proceedings against him. He avers that he was not warned of any intended prosecution and was not served with any summons and was not otherwise aware of any intended trial. He avers that he did not instruct or authorise any lawyer to represent him. He avers that he has lived in Ireland since 22nd February, 2007 and that he was in Ireland on the court dates referred to in the EAW.
12. By additional information dated 28th July, 2021, it is indicated that the respondent was represented in the proceedings by a court-appointed lawyer. It is indicated that the respondent has a right to a retrial as well as a right to appeal but that the specific conditions for the application of the "*stated extraordinary remedies are regulated by the Act no. 301/2005 Coll. Criminal procedure in § 368 et seq*". The additional information indicates that the respondent could not be summoned as he could not be found. Documents addressed to the accused were served upon the lawyer who had been appointed for him.

13. Section 45 of the Act of 2003 transposes into Irish law Article 4A of the Framework Decision and provides:-

*"45. — A person shall not be surrendered under this Act if he or she did not appear in person at the proceedings resulting in the sentence or detention order in respect of which the European arrest warrant ... was issued, unless in the case of a European arrest warrant, the warrant indicates the matters required by points 2, 3 and 4 of point (d) of the form of warrant in the Annex to the Framework Decision ... as set out in the table to this section." [Table set out thereafter]*

14. It is accepted by the applicant that a sentence was imposed *in absentia* and that point 3.2. of Table D upon which the issuing judicial authority relies has not in fact been complied with as the respondent did not give any mandate to a lawyer to represent him. The respondent's averments that he was totally unaware of the intention to bring the proceedings and the existence of the proceedings have not been contradicted.
15. In answer to a request for further information, the issuing judicial authority indicated that the respondent would be entitled to an appeal or retrial, referred to as "*extraordinary remedies*" regulated by Act no. 301/2005 Coll. Criminal Procedure in § 368 et seq.
16. Due to a lack of clarity, by letter dated 30th July, 2021 further information was sought from the issuing judicial authority concerning the nature of the right of appeal or retrial including the time the respondent would have to initiate such an appeal, confirmation that the time provided for same had not already expired and seeking details as to the conditions of Act no. 301/2005 Coll. Criminal Procedure in § 368 et seq. and a translated version of same. By reply dated 20th September, 2021, the issuing judicial authority indicated that the respondent has the right to a retrial, he also has the right to an appeal and he has the right to personally participate in proceedings of the extraordinary remedies above. A re-examination of the merits of the case, including new evidence, will be allowed in proceedings of a retrial. A retrial or appeal may lead to the original decision being annulled and a new decision being issued. The additional information confirms that the specific conditions for application of the appeal are regulated by Act no. 301/2005 Coll. Criminal Procedure in § 368 et seq. but in the opinion of the issuing judicial authority, the information requested goes beyond the information necessary to determine the EAW and therefore it declines to provide same. It also declined to provide information concerning the time within which the appeal could be initiated or to confirm that same had not already expired. As regards the statutory provisions in question, the details of same were not provided and nor was a translation of same. The Court was advised to contact the Ministry of Justice of the Slovak Republic in that regard. The additional information expressly states: "*All relevant information was provided in the framework of the European Arrest Warrant*". The issuing judicial authority has made it clear that as far as it is concerned, the application can be determined on the basis of the EAW.
17. Counsel on behalf of the respondent submits that the information provided by the issuing judicial authority in respect of the existence of an appeal is not sufficiently clear to show compliance with point 3.4. of Table D. In particular, he submits that it is not clear that the

respondent has an absolute right of appeal, as required by point 3.4. as opposed to merely a right to apply for leave to appeal. He referred to the use of the expression “*extraordinary remedies*” in that regard and that the issuing judicial authority has not set out the time within which the respondent would have to lodge an appeal.

18. In the EAW, the issuing judicial authority seeks to rely upon point 3.2. of Table D provided for in the Framework Decision and s. 45 of the Act of 2003. In fact, the requirements of point 3.2. of Table D have not been complied with as the respondent did not provide a mandate to any lawyer.
19. Insofar as the applicant sought to go beyond the terms of the EAW and rely upon the existence of a right of appeal or retrial so as to show substantive compliance with Article 4A of the Framework Decision and s. 45 of the Act of 2003, it should be noted that the issuing judicial authority has clearly indicated that all relevant information is as set out in the EAW. Counsel for the applicant submits that it had been indicated that the respondent has a right of appeal and/or retrial, and that the Court could infer that the conditions governing such appeal met the requirements of s. 45 of the Act of 2003. I am not satisfied to draw such an inference on the basis of the information before the Court.
20. In *Minister for Justice and Equality v. Zarnescu* [2020] IESC 59, the Supreme Court indicated that s. 45 of the Act of 2003 is to be given a purposive interpretation and that even though a particular set of circumstances may not fit neatly into one of the scenarios set out in Table D, it may nevertheless be permissible for the Court to order surrender if satisfied that the requirements of s. 45 have been substantively met. However, as Baker J. pointed out in *Zarnescu*, the Court, before making an order for surrender in such circumstances, must take a step back and satisfy itself that the defence rights of the respondent have not been breached and will not be breached.
21. In this instance, the issuing judicial authority has indicated that all relevant information is as set out in the EAW. It has declined to furnish sufficient information which would allow this Court to come to a conclusion that the requirements of Article 4A of the Framework Decision or s. 45 of the Act of 2003 have been met in substance. The applicant has failed to satisfy me that the defence rights of the respondent have not been breached. He was tried in absentia without any knowledge of the criminal proceedings in circumstances where lack of diligence on his part has not been established. Moreover, I am not satisfied that the entitlement of the respondent to an appeal or retrial is such as to adequately vindicate and give effect to his defence rights, particularly in circumstances where the issuing judicial authority has declined to indicate the timeframe within which the respondent will have to bring such an appeal or retrial and confirm that such time has not already expired. It is an essential part of point 3.4. of the Table D in Article 4A of the Framework Decision and s. 45 of the Act of 2003 that the time limit for lodging an application for a retrial or an appeal should be set out. Despite a request for same, such information has not been furnished. Similarly, despite a request for information as to the conditions applicable to any right of appeal or retrial, such information has not been provided.

22. I am satisfied that surrender is precluded by reason of s. 45 of the Act of 2003 and I therefore refuse the application for an order for surrender of the respondent.